Jan 21 2000

(7)

Supreme Court, U.S.
FILED
JAN 21 2000
CLERK

No. 98-2060

In The

Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,

Petitioner,

v.

ROBERT W. CARPENTER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MERIT BRIEF FOR RESPONDENT, ROBERT W. CARPENTER

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78 pp

QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as cause for the procedural default of another habeas claim when the ineffective-assistance-of-counsel claim is itself procedurally defaulted.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article III, Section 1 of the United States Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

3. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this merit brief.

5. Current and Former S. Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this merit brief.

STATEMENT OF THE CASE

On the evening of October 5, 1988, the body of 73-year-old Thelma Young was found in her Columbus, Ohio home by her son. Ms. Young was murdered, and money was allegedly missing from her home.

Although Respondent, Robert Carpenter, was arrested for Ms. Young's murder, he maintained his innocence. He was indicted by a Franklin County, Ohio grand jury on one count of aggravated murder with a death penalty specification pursuant to Ohio Rev. Code Ann. § 2903.01 (Anderson 1999) and one count of aggravated robbery pursuant to Ohio Rev. Code Ann. § 2911.01 (Anderson 1999).

Carpenter entered into a conditional plea agreement. He waived his right to a jury trial and pleaded guilty to the indictment while maintaining his innocence in accordance with the procedure approved of by this Court in *North Carolina v. Alford*, 400 U.S. 25 (1970). Carpenter entered his plea to avoid the death penalty. J.A. 48.

On March 29, 1990, the culpability hearing concerning Carpenter's guilty plea was conducted before a three-judge panel. At the culpability hearing, the prosecutor recited a statement of facts. Tr. 41-70; J.A. 48-49, 53. Carpenter refused to stipulate or adopt the statement of facts proffered by the prosecutor during the culpability hearing. Tr. 15-17 (Appendix A-6-A-8); J.A. 48-49.[1] Neither testimony nor physical evidence was introduced in support of the charges in the indictment. *See e.g.* Tr. 508 (Trial court denied prosecutor's request to admit photographs at the penalty phase because they were not evidence, properly marked and introduced at culpability phase.) Based on the prosecutor's statement of facts, the

[1] The Warden failed to challenge this district court finding in his appeal to the Sixth Circuit.

three-judge panel accepted Carpenter's guilty plea. Tr. 71-72.

At the penalty phase, Carpenter presented mitigating evidence for the trial court's sentencing consideration. Tr. 83-463. Carpenter was sentenced to life imprisonment with no possibility of parole for thirty years. J.A. 9-16.

Carpenter was appointed new counsel to pursue his direct appeal. Appellate counsel never met with Carpenter to discuss the case and never provided Carpenter with a copy of his trial transcript. Carpenter's Application for Reopening, p. 11 (Appendix A-11). Appellate counsel raised a single issue on appeal claiming that the trial court erred by imposing a life sentence with no possibility of parole for thirty years instead of a life sentence with no possibility of parole for twenty years. The Ohio Court of Appeals for the Tenth District affirmed the sentence. *Ohio v. Carpenter*, 1991 WL 35009 (Mar. 12, 1991). Appellate counsel did not seek discretionary review in the Supreme Court of Ohio. Upon ending his representation, appellate counsel did not advise Carpenter that he could challenge his appellate counsel's effectiveness. Carpenter's Application for Reopening, p. 1 (Appendix A-9).

On March 13, 1992, Carpenter pursued state post-conviction relief pro se pursuant to Ohio Rev. Code Ann. § 2953.21[2] (Anderson 1999), and he requested a copy of his trial transcript. The trial court held that Carpenter had no right to his transcript and dismissed the post-

[2] Ohio's post-conviction statute was amended in 1996, but those amendments are not relevant here.

conviction petition. Carpenter appealed pro se to the Ohio Court of Appeals for the Tenth District. After briefing, the court appointed post-conviction counsel. Ultimately, the Ohio Court of Appeals for the Tenth District denied Carpenter's appeal and his request for a copy of his transcript. *Ohio v. Carpenter*, 1992 WL 361815 (Dec. 3, 1992). On April 14, 1993, the Supreme Court of Ohio declined jurisdiction. *Ohio v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

Represented by new retained counsel, Carpenter finally secured a copy of his trial transcript giving him his first opportunity to evaluate the quality of his trial and direct appeal attorneys. On July 15, 1994, Carpenter challenged the effectiveness of his direct appeal counsel for failing to argue that his guilty plea was illegally obtained because no evidence was presented to support the charges in the indictment. Carpenter pursued this claim pursuant to Ohio R. App. P. 26(B). Carpenter asserted that "good cause" existed for consideration of his Application to Reopen because his previous appellate counsel did not meet with him during his appeal, did not allow him to review or assist in preparation of the brief, and did not inform him how to challenge the effectiveness of his appellate attorney. Carpenter's Application for Reopening, pp. 1, 11 (Appendix A-9-A-11). The State opposed the application. The Ohio Court of Appeals for the Tenth District summarily concluded that Carpenter did not demonstrate "good cause" for not filing his application within ninety days of the court of appeal's decision affirming his conviction and sentence. J.A. 19-20.

Carpenter then requested the Supreme Court of Ohio to exercise its discretionary jurisdiction to consider his

appeal. After merit briefing by Carpenter and the State, the Supreme Court of Ohio affirmed the Ohio court of appeals. J.A. 21-22.

On May 3, 1996, Carpenter filed a habeas corpus petition in the United States District Court for the Southern District of Ohio. He alleged: 1) his guilty plea was illegally obtained because the state presented no evidence in support of the indictment; 2) ineffective assistance of appellate counsel for failing to challenge the illegal plea; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state courts through the application of Ohio R. App. P. 26(B). J.A. 28-29.

In his return of writ, the Warden conceded that Carpenter exhausted all of his claims but asserted that Carpenter procedurally defaulted them. Return of Writ, pp. 7-8. In addressing the merits of Carpenter's claims, the Warden did not refute the illegality of Carpenter's plea. Rather, he argued that there was overwhelming "evidence" of Carpenter's guilt even though absolutely no evidence of the crime was ever presented. Return of Writ, p. 10. He made cursory arguments in response to Carpenter's other two claims. Return of Writ, pp. 11-12.

Carpenter filed a traverse in which he argued, among other things, that his claim of ineffective appellate counsel could not be defaulted because Ohio R. App. P. 26(B) was not an adequate and independent rule. Traverse, pp. 16-20. In the alternative, he argued that if his claims were in fact procedurally defaulted, he could establish cause and prejudice for their default. Traverse, p. 21. The Warden did not respond to Carpenter's cause and prejudice arguments.

The district court determined that Carpenter's illegal-plea claim was procedurally defaulted; thus, it went on to consider the federal, procedural question whether the default of the illegal-plea claim could be excused. J.A. 40. Because Carpenter asserted appellate ineffectiveness as the cause for the default of his merit claim, the district court held that it needed to determine if the ineffectiveness claim was preserved for federal review. J.A. 41.

In order to determine if Carpenter's ineffectiveness claim was defaulted, the district court first considered whether Ohio had an independent and adequate state rule upon which the default could be premised. The district court concluded that Rule 26(B) was not adequate because it was not consistently applied and regularly followed. J.A. 42. Therefore, it held that Carpenter's ineffectiveness claim was not procedurally defaulted. J.A. 44.

The district court then considered the merits of the ineffectiveness claim as cause for the default of the plea claim. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the district court determined that Carpenter had, in fact, been denied the effective assistance of appellate counsel. J.A. 49. Carpenter was also prejudiced because his guilty plea was illegally obtained. J.A. 49. Therefore, Carpenter demonstrated cause and prejudice for the default of his illegal-plea claim. Rather than grant relief because Carpenter's guilty plea was illegally obtained, the district court issued a conditional writ directing the State to reinstate Carpenter's direct appeal. J.A. 50.

The Warden appealed to the Sixth Circuit. The sole issue raised by the Warden was: "Did the district court

erroneously conclude that Carpenter's ineffective assistance of appellate counsel claim is not barred by procedural default?" Final Brief of Respondent-Appellant, p. viii. Further, the Warden conceded that the constitutional error found by the district court was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Final Brief of Respondent-Appellant, p. iii (Appendix A-14-A-15).

Carpenter cross-appealed. Relying on *Murray v. Carrier*, 477 U.S. 478 (1986), he argued that a habeas petitioner need only exhaust cause and prejudice arguments before they may be considered. Although the Warden filed an opposing brief, it was unresponsive to Carpenter's cross appeal; the Warden argued only that Rule 26(B) was adequate and independent.

The Sixth Circuit found that a habeas petitioner need only exhaust cause and prejudice requirements; therefore, it did not consider the Warden's position that Rule 26(B) was an adequate and independent rule. In dicta, however, the Circuit noted that Rule 26(B) was likely inadequate. J.A. 65 n. 13.

Finding that Carpenter properly exhausted his ineffectiveness claim, the Sixth Circuit proceeded to the *Strickland* analysis. J.A. 62. The court held that Carpenter was denied the effective assistance of appellate counsel because his attorney did not challenge the illegality of his plea. J.A. 64 ("[I]t is unfathomable why Carpenter's counsel failed to raise a sufficiency of the evidence claim on appeal.")

The Sixth Circuit affirmed the district court's grant of a conditional writ but ordered a new trial as opposed to a new appeal because Carpenter's guilty plea was obtained

in violation of the Due Process Clause of the Fourteenth Amendment. J.A. 66. While recognizing the merits of the claim, the Sixth Circuit noted that the appropriate remedy was premised upon the resolution of a factual issue, whether Carpenter stipulated to the prosecutor's statement of facts.[3] J.A. 64 n. 11. Upon remand, both the Warden and Carpenter agreed that the sole remaining issue for resolution by the district court was the nature of the remedy to be given Carpenter. *See* Respondent Mohr's Response to Petitioner's Motion to Receive Legal Memoranda From the Parties, p. 2; Carpenter's Responsive Memorandum to the Magistrate Judge's May 18, 1999 Order, pp. 2-3.

The Warden requested rehearing *en banc*. Because no Circuit Judge of the Sixth Circuit requested a vote, the original panel considered and denied the Warden's request for rehearing. J.A. 67. The mandate issued and has not been recalled.

The Warden filed a petition for writ of certiorari to this Court on June 22, 1999. On November 8, 1999, this Court granted the Warden's petition for writ of certiorari and granted Carpenter's motion to proceed in forma pauperis. On December 13, 1999, this Court appointed undersigned counsel. On December 23, 1999, the Warden filed his merit brief. Carpenter now respectfully submits his merit brief in response.

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[3] This was error. The Warden did not appeal the finding by the district court that Carpenter did not stipulate or adopt the prosecutor's statement of facts. J.A. 48-49.

SUMMARY OF ARGUMENT

No federal court has found Carpenter's appellate-ineffectiveness claim to be procedurally defaulted. Despite that fact, the Warden asks this Court to determine if procedurally defaulted ineffective-assistance-of-counsel claims may be asserted as cause for the default of a merits claim. Questions of cause and prejudice, however, are not relevant until a federal court determines that the state procedural rule relied upon for the default is adequate and independent. *See Coleman v. Thompson*, 501 U.S. 722 (1991).

The district court held that Ohio R. App. P. 26(B), the rule that lies at the very heart of the Warden's procedural default argument, is inadequate because it is inconsistently applied. Thus, it determined that Carpenter's ineffective-assistance-of-counsel claim is not procedurally defaulted. The Sixth Circuit did not disturb the district court's ruling.

Because no federal court has found that Carpenter's appellate-ineffectiveness claim is procedurally defaulted, the Warden's question is hypothetical. For this reason, the issue briefed by the Warden is not presented with the concreteness required to support constitutional adjudication and, therefore, certiorari should be dismissed as improvidently granted.

If this Court does reach the merits of this case, principles of comity do not require extending the procedural default doctrine to claims asserted as cause. The exacting standard for ineffective-assistance-of-counsel claims combined with the exhaustion requirement of *Murray v. Carrier*, 477 U.S. 478 (1986), ensures that state courts have the

first opportunity to hear such claims and that federal courts retain the ability to remedy federal constitutional violations. The Warden has not identified a state interest that justifies an extension of the procedural default doctrine to cause arguments.

Contrary to the Warden's assertion, this Court did not extend the procedural default analysis to claims asserted as cause in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). *LaGrand* is not dispositive of the question presented here because it is a per curiam decision predicated on a habeas petitioner's outright waiver of his claims. *LaGrand* was decided on the basis of waiver, not procedural default. While *LaGrand* does not resolve the issue before this Court, the answer can be ascertained by a survey of this Court's habeas corpus jurisprudence.

This Court has always treated habeas merit claims and reasons advanced as cause for the default of those claims differently. Habeas claims are divided into two categories: merit claims and gateway claims. *See Herrera v. Collins*, 506 U.S. 390 (1993); *Schlup v. Delo*, 513 U.S. 298 (1995). Merit claims are those claims that, if resolved in a petitioner's favor, authorize a federal court to issue a writ of habeas corpus. Resolution of gateway claims in a petitioner's favor, on the other hand, merely authorizes a federal court to consider otherwise procedurally defaulted merit claims. In both *Herrera* and *Schlup*, this Court considered procedurally defaulted gateway claims.

Historically, this Court has only applied the procedural default doctrine to merit claims. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Connor, J., dissenting) (noting that *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); *Reed v. Ross*, 468 U.S. 1 (1984); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); and *McClesky v. Zant*, 499 U.S. 467 (1991) concerned whether federal courts could consider the merits of a claim). When a habeas petitioner proves a gateway claim, such as ineffective-assistance-of-counsel, he does not win his case. Even after meeting the rigorous standard for ineffectiveness claims, all he achieves is the right to have his otherwise defaulted merit claim reviewed by a federal court. Thus, this Court's well-established principle of applying the procedural default doctrine to merit claims protects a state's interest in the finality of its criminal verdicts without curtailing federal review of constitutional violations.

Engrafting an additional procedural default requirement to cause arguments will cost more money and further delay the resolution of habeas corpus cases. The very point of *Carrier* was to make the job of habeas courts manageable by giving them the familiar, yet very demanding, *Strickland v. Washington*, 466 U.S. 668 (1984), standard to apply. *Carrier*, 477 U.S. at 488-489. Because *Strickland* is so rigorous, it also guarantees that there will not be a flood of overturned state cases. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

This *is* a case about federalism, but not for the reasons asserted by the Warden. This is a case about federalism because it asks if Article III Courts should retain their ability to determine whether merit claims should be reviewed or whether that responsibility should be abdicated to the states. The Warden is only interested in precluding federal courts from acting at all.

Federal courts should retain their ability to evaluate state procedural rules and to determine when claims should be reviewed on their merits. Only by doing so, will the federal courts retain the power to remedy federal constitutional violations in those rare cases, like this one, that are deserving of the writ of habeas corpus.

ARGUMENT

I

THE QUESTION PRESENTED BY THE WARDEN IS NOT SUPPORTED BY THE RECORD IN THIS CASE.

No federal court has ruled that Carpenter's appellate-ineffectiveness claim is procedurally defaulted. The Warden conceded that point. Warden's Merit Brief, pp. 8-9; *see also* Warden's Certiorari Petition, pp. 8-9 n. 2 ("remand would be appropriate to allow the court of appeals to consider" the adequacy of the rule). By doing so, he also conceded that the question presented is not ripe for review.

Wainwright v. Sykes, 433 U.S. 72 (1977), requires a finding of procedural default before a habeas petitioner need present cause and prejudice arguments. Under *Sykes*, the interests of comity and federalism require that a federal court respect the "adequate and independent state ground" upon which a state court relied in rejecting a federal claim. *Id.* at 78-79. A procedural default occurs only if the state proves the default by asserting it in a timely manner, by establishing that the state actually has an "adequate" and "independent" procedural rule the prisoner violated, and by demonstrating that the state

courts actually relied upon the rule to deny the petitioner relief. *James v. Kentucky*, 466 U.S. 341, 348-351 (1984). Only then does a federal court consider whether a petitioner can prove cause and prejudice for the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Consistent with this Court's ordered scheme, "considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court." *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980). The federal court best positioned to decide the cognizability of a procedural default is the court within the state's jurisdiction. *Id.* This Court has repeatedly recognized that "courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n. 7 (1980)); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-154 (1979); *see also Terrell v. Morris*, 493 U.S. 1, 3 n. 1 (1989) ("since the answer to the question requires a familiarity with Ohio law, it should not be addressed in this Court before we have the benefit of the Court of Appeals' views").

The district court held that Rule 26(B) did not constitute an adequate and independent state ground upon which Carpenter's appellate-ineffectiveness claim could be defaulted. J.A. 42. The Sixth Circuit agreed, in dicta, that the state procedural ground was likely inadequate. J.A. 65 n. 13. Because no federal court has determined that Carpenter's ineffectiveness claim is procedurally defaulted, he need not offer any cause arguments. Thus, it is irrelevant as a matter of fact and law whether a

habeas petitioner can procedurally default his cause arguments. Simply put, the issue upon which this Court granted certiorari does not exist in this case.

Article III of the Constitution defines and limits the power of the Judiciary in terms of specified cases and controversies. Because this Court is an Article III Court, the exercise of its jurisdiction is circumscribed by the various elements of what is commonly referred to as "justiciability." For purposes of justiciability, a case before this Court must involve a controversy that is "definite and concrete, touching the legal relationships of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). This Court does not engage in academic exercises concerning hypothetical issues. *See e.g. Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) (jurisdiction "should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' "); *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (certiorari dismissed, Article III requires an actual dispute between the parties).

In this Court's plenary review, facts may be discovered via briefing or argument that indicate that the grant of certiorari was improvident. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *see e.g. Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (certiorari dismissed as improvident when "it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us."); *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) (certiorari dismissed as improvident, because "artificial and hypothetical issue"

requested "an advisory opinion"); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (deciding case requires resolution of hypothetical question; writ dismissed as improvidently granted).

This case is predicated on an antecedent issue to the question on which certiorari was granted – whether Carpenter defaulted his ineffectiveness claim. Both parties agree that no federal court has found Carpenter's ineffectiveness claim to be procedurally defaulted. *See* Warden's Merit Brief, pp. 8-9; Warden's Certiorari Petition, p. 9 n. 2. Because a cognizable procedural default is a necessary predicate for the onset of cause and prejudice considerations, this omission renders the Warden's certiorari question purely hypothetical. It would be inappropriate to leap-frog over the antecedent procedural default question in order to reach the contingent cause question that the Warden urges this Court to resolve. To do so would be premature and advisory. Consequently, Carpenter respectfully requests this Court to dismiss the writ of certiorari.

II

CARPENTER'S ILLEGAL-PLEA CLAIM HAS MERIT, AND THE DISTRICT COURT HELD THAT OHIO APPELLATE RULE 26(B) CANNOT EFFECTUATE A FEDERAL DEFAULT OF CARPENTER'S APPELLATE-INEFFECTIVENESS CLAIM.

Two claims lie at the core of this case: Carpenter's claim that his guilty plea was illegally obtained and his claim that he was denied the effective assistance of appellate counsel. The Warden does not accurately explain those claims or the legal standards by which they are

judged. Assuming that the question presented is properly before this Court, it cannot be addressed without a full and correct understanding of those underlying issues. Therefore, in order to correct the errors made by the Warden, Carpenter submits the following introductory argument.

A. CARPENTER'S ILLEGAL-PLEA CLAIM HAS MERIT, AND THE WARDEN HAS NEVER CHALLENGED THE MERITS OF THAT CLAIM.

The Warden asserts that he does not understand the nature of Carpenter's illegal-plea claim and that the claim has not been addressed in the courts below. Warden's Merit Brief, p. 6 n. 4. The Warden's professed confusion aside, both lower courts squarely addressed the issue, J.A. 47-48, 62-63, and the Sixth Circuit specifically determined that Carpenter's illegal-plea claim had merit. J.A. 66.

The basis of Carpenter's illegal-plea claim is that the prosecution did not introduce any evidence in support of the charges in the indictment. When a defendant claims his factual innocence while pleading guilty, state courts are constitutionally required to establish a basis for the guilty plea. *See North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970). Without presentation of evidence that establishes a factual basis for the crimes charged, a trial court may not accept a guilty plea to a capital offense. *Id.*

The only support offered for the charges against Carpenter was the statement of the prosecutor. The trial court accepted Carpenter's guilty plea based solely on

the prosecution's version of facts. Carpenter refused to stipulate to those facts. Tr. 15-17; J.A. 48-49. The trial court accepted the plea despite the fact that, in Ohio, "a three-judge panel is required to examine witnesses and to hear any other evidence properly presented by the prosecution in order to make a Crim. R. 11 determination as to the guilt of the defendant." *Ohio v. Green*, 81 Ohio St. 3d 100, 689 N.E.2d 556, syl. (1998); *Ohio v. Post*, 32 Ohio St. 3d 380, 393, 513 N.E.2d 754, 766 (1987); Ohio R. Crim. P. 11; Ohio Rev. Code Ann. § 2945.06 (Anderson 1999); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Evitts v. Lucey*, 469 U.S. 387 (1985).

When a defendant pleads to a capital indictment, the trial court is required to examine witnesses to determine if the defendant is guilty of aggravated murder or of a lesser crime. *Green*, 81 Ohio St. 3d at 103, 698 N.E.2d at 559; *Post*, 32 Ohio St. 3d at 393, 513 N.E.2d at 766. Failure to do so renders any resulting conviction void. *Id.*

The Warden suggests that the rule was first articulated by the Supreme Court of Ohio in 1998 when it decided *Green*. Warden's Merit Brief, p. 10. Long before Carpenter's culpability hearing, however, Ohio and Federal law required a factual basis for charges in an indictment before a defendant, who maintains his innocence, may plead guilty to a capital offense. *See Post*, 32 Ohio St. 3d at 393, 513 N.E.2d at 766; *Ohio v. Taylor*, 30 Ohio App. 2d 252, 285 N.E.2d 89 (1972); *Alford*, 400 U.S. at 37-39. In fact, Ohio recognized that there must be some proof that a crime occurred beyond a prosecutor's statement since at least 1949 when the Supreme Court of Ohio held that a prosecutor's statement was not evidence. *See Maggio v. Cleveland*, 151 Ohio St. 136, 84 N.E.2d 912

(1949). *Green* merely incorporated the rule into the Supreme Court of Ohio's syllabus law.

The district court held that because the prosecution did not offer any evidence to support the charges in the indictment, the trial court accepted Carpenter's guilty plea in violation of federal law. J.A. 49. It also held that Carpenter was denied the effective assistance of appellate counsel because the error was not raised on direct appeal. J.A. 49. The Sixth Circuit agreed, holding that Carpenter's guilty plea was obtained in violation of the Due Process Clause of the Fourteenth Amendment, J.A. 62, and that Carpenter's appellate counsel was ineffective for failing to raise such an obvious error on direct appeal. J.A. 63.

Despite the Sixth Circuit's specific holding that it was constitutional error to accept Carpenter's plea without a factual basis, the Warden argues that the merits of the claim have never been addressed. Warden's Merit Brief, p. 6 n. 4. The opinions of both lower courts demonstrate otherwise; both held that Carpenter's illegal plea claim has merit, and both courts held that Carpenter was denied the effective assistance of appellate counsel because the error was not raised on direct appeal. J.A. 49, 64.

B. OHIO'S PROCESS FOR REVIEWING CLAIMS OF APPELLATE INEFFECTIVENESS WAS NOT SETTLED UNTIL 1996.

The Warden asserts that Ohio's process for addressing claims of appellate ineffectiveness was firmly established in 1993, and he suggests that Rule 26(B)'s ninety-

day time limit is jurisdictional. Neither assertion is accurate.

Prior to 1992, the process for reviewing appellate-ineffectiveness claims was unsettled in Ohio. *See Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990); *Ohio v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). In *Murnahan*, the Supreme Court of Ohio harmonized the various procedures used to address claims of appellate ineffectiveness and held that appellate-ineffectiveness claims could not be raised in post-conviction proceedings. *Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204, syl. 1 and 2 (1992). To pursue them, a prisoner would have to file an "application for delayed reconsideration" in the Ohio appellate courts. *Id.* at 66, 584 N.E.2d at 1209.

In the wake of *Murnahan*, the Supreme Court of Ohio crafted Appellate Rule 26(B). The rule requires claims of appellate ineffectiveness to be filed within ninety days of the original court of appeals decision affirming a conviction. If an applicant cannot file within ninety days, he has to provide an explanation amounting to "good cause" for the delay.

The Warden asserts that Ohio's process for addressing appellate-ineffectiveness claims was "firmly established" when Rule 26(B) went into effect on July 1, 1993. Warden's Merit Brief, pp. 5-7. But there is more to the story.

At the time Rule 26(B) was adopted, the Supreme Court of Ohio had another rule in place that divested the Ohio courts of appeals of jurisdiction to consider any action once a notice of appeal was filed in the Supreme

Court of Ohio or when the time for filing an appeal expired. Former S. Ct. Prac. R. II(2)(D)(1):

> After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to *rule on an application for reconsideration* filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(Emphasis added) (Appendix A-4). For nearly three years after Rule 26(B) was adopted, Ohio appellate courts were without jurisdiction to consider Rule 26(B) applications because of former S. Ct. Prac. R. II(2)(D)(1). *See, e.g., Ohio v. Howe*, 73 Ohio St. 3d 35, 652 N.E.2d 193 (1995); *Ohio v. Wogenstahl*, 75 Ohio St. 3d 273, 662 N.E.2d 16 (1996).

In early 1996, the Supreme Court of Ohio expressly held that former S. Ct. Prac. R. II(2)(D)(1) divested the courts of appeals of jurisdiction to entertain Rule 26(B) applications. *Wogenstahl*, 75 Ohio St. 3d at 275, 662 N.E.2d at 17. Because former S. Ct. Prac. R. II(2)(D)(1) specified that the courts of appeals retained jurisdiction only to rule on applications for reconsideration (App. R. 26(A)) as opposed to applications to reopen (App. R. 26(B)), the supreme court held that jurisdiction of the court of appeals was not retained to rule upon an application for reopening under App. R. 26(B). *Wogenstahl*, 75 Ohio St. 3d at 275, 662 N.E.2d at 17.

Wogenstahl was short-lived. Twenty-six days after it was decided, on April 1, 1996, the Supreme Court of Ohio finally corrected the obvious conflict between Rule 26(B)

and former S. Ct. Prac. R. II(2)(D)(1). It adopted the following amendment to S. Ct. Prac. R. II(2)(D)(1):

> After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(Appendix A-5.) The distinction between Rule 26(A) and (B) was eliminated. To dispel any confusion, the court clarified the significance of the amendment in the accompanying staff notes: "This amendment provides that a court of appeals retains jurisdiction to rule on *either* an application for reconsideration or an application for reopening filed pursuant to App. R. 26." (Emphasis added.)

Although the state relied upon the jurisdictional defect in the rule in response to Carpenter's application to reopen, Memorandum in Opposition to Carpenter's Application to Reopen, pp. 4-5 (Appendix A-12-A-13), the Warden now asserts that Carpenter did not file his Rule 26(B) application until more than a year after Rule 26(B) "firmly established" the procedure for pursuing claims of appellate ineffectiveness. Warden's Merit Brief, pp. 5-7. But as the history of Rule 26(B) demonstrates, Ohio's procedure for addressing claims of appellate ineffectiveness was not settled until April 1, 1996 – almost two years after Carpenter filed his application to reopen in the court of appeals on July 15, 1994.

The Warden also suggests that a habeas petitioner can intentionally bypass Rule 26(B) and deprive Ohio of ever reviewing a claim of appellate ineffectiveness. In other words, the Warden suggests that Carpenter had to file his application within ninety days or not at all. Warden's Merit Brief, p. 26. But the very text of Rule 26(B) refutes the Warden's position: "An application for reopening shall be filed in the court of appeals within ninety days from journalization of the appellate judgment *unless the applicant shows good cause for filing at a later time.*" Ohio R. App. P. 26(B)(1) (emphasis added).

Contrary to the underlying facts of *Coleman v. Thompson*, 501 U.S. 722 (1991), upon which the Warden relies, an Ohio appellate court always has the discretion to consider the merits of a Rule 26(B) application. If a prisoner files his application more than ninety days after the court of appeals decision, he must show good cause for the delay. The good cause provision of Rule 26(B), however, has not been consistently applied by the Ohio appellate courts. J.A. 43.

The district court addressed the inadequacy of Rule 26(B) holding that the Ohio courts of appeals have not consistently applied the "good cause" provision. J.A. 42. The district court also held that the Supreme Court of Ohio has offered little guidance on the meaning of the rule. J.A. 43. As a consequence, the district court held that because Rule 26(B) is not firmly established and regularly followed, Carpenter's appellate-ineffectiveness claim could not be procedurally defaulted. J.A. 44.

The fact that the district court held that Carpenter's ineffectiveness claim was not procedurally defaulted

seems to be lost on the Warden. Several times in his merit brief, he argues that Carpenter's ineffectiveness claim is procedurally defaulted because Carpenter "missed the State's deadline for raising an ineffective-assistance claim."[4] Warden's Merit Brief, pp. 27, 28, and 29. Yet, the Warden acknowledges that the district court held that "Carpenter's procedural default in raising his ineffectiveness claim did not pose an adequate state ground barring federal-court review the claim." Warden's Merit Brief, pp. 8-9.

The Sixth Circuit did not address the adequacy of Rule 26(B) but stated that it likely agreed with the district court that the "good cause" provision of Rule 26(B) has been inconsistently applied. J.A. 65 n. 13. A federal court must first determine if a state rule is firmly established and regularly applied before it can find that a habeas claim is procedurally defaulted. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The Warden acknowledges that the Sixth Circuit did not engage in that necessary step, Warden's Merit Brief, p. 9 n. 7, but somehow reasons that Carpenter's ineffectiveness claim is procedurally defaulted anyway.

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[4] This may also explain why the Warden's *Amici* mistakenly presume, without citing to any holding below, that Carpenter's ineffectiveness claim is procedurally defaulted. The Warden's *Amici* argue that "[b]ecause the court of appeals has effectively ruled that procedurally defaulted ineffective assistance of counsel claims will be resurrected in federal court to serve as "cause" for other procedurally defaulted claims, a petitioner can knowingly choose to default claims in the state court in hopes that a federal court will accord more favorable review of his federal claims." *Amici* Brief, p. i.

It is true that a litigant commits a procedural default if a state court so holds and that a prisoner may forfeit later state-court opportunities to litigate claims because of that default. However, procedural defaults and resulting forfeiture sanctions do not constitute grounds that are adequate, as a matter of federal law, to bar habeas review unless a federal court determines that the state procedural rule is adequate, independent, firmly established and consistently applied. *See James v. Kentucky*, 466 U.S. 341, 348-351 (1984). The district court squarely held that Rule 26(B) does not meet these criteria, J.A. 44, and the Sixth Circuit did not disturb that ruling.

One thing in this case is certain. No federal court has found that Rule 26(B) is an adequate and independent state rule that is firmly established and regularly followed. Without such an explicit finding, Carpenter's ineffectiveness claim simply cannot be procedurally defaulted.

III

THE PROCEDURAL DEFAULT DOCTRINE DOES NOT APPLY TO REASONS ADVANCED AS CAUSE FOR THE DEFAULT OF OTHER CLAIMS IN HABEAS CORPUS PROCEEDINGS.

The Warden invites this Court to apply the procedural default doctrine to reasons that are asserted as cause for the default of a habeas claim. He does so without articulating any state interest that justifies an extension of *Wainwright v. Sykes*, 433 U.S. 72 (1977), to cause arguments or by explaining why existing state interests are not already adequately protected. Assuming

that the question is properly before this Court, Carpenter urges this Court to decline the Warden's invitation.

In this section, Carpenter explains why there is no state interest that justifies applying the procedural default doctrine to reasons advanced as the cause for a habeas claim's procedural default. First, Carpenter explains that *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999), is not dispositive of the question presented here. Second, Carpenter explains that habeas claims and the reasons offered to excuse their default are entirely different creatures which deserve different treatment and have always been treated differently by this Court. Finally, Carpenter asserts that whether there has been a cognizable procedural default of a habeas claim is purely a question of federal, procedural law.

A. CONTRARY TO THE WARDEN'S ERRONEOUS ASSERTION, *STEWART V. LEGRAND*, 119 S. Ct. 1018 (1999) (PER CURIAM), DID NOT RESOLVE THE QUESTION PRESENTED TO THIS COURT.

The Warden relies heavily on dicta from this Court's per curiam opinion in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). *LaGrand*, however, is not dispositive of the question presented here because it is a per curiam opinion predicated on a habeas petitioner's outright waiver of his claims.

LaGrand was issued without full briefing or oral argument and, thus, offers little precedential value. Typically, this Court does not seek guidance from opinions that are issued without the benefit of full briefing and

oral argument. *Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) ("For example, we have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument") (citing *Gray v. Mississippi*, 481 U.S. 648, 651, n.1 (1987)); *United States v. Dixon*, 509 U.S. 688, 716 (1993) ("A summary reversal, like *Harris*, 'does not enjoy the full precedential value of a case argued on the merits.' Today's decision shows the pitfalls inherent in reading too much into a 'terse *per curiam*.' ") (Rehnquist, C. J., concurring in part and dissenting in part) (citations omitted).

In addition to the fact that *LaGrand* lacks authoritative value, it is also distinguishable from Carpenter's case. Unlike Carpenter, LaGrand specifically waived *both* his underlying merit claim (that lethal gas is unconstitutional) and his cause argument that he was denied the ineffective assistance of counsel. LeGrand was precluded from challenging his means of execution because he declared, and later reaffirmed, that he desired to be executed by lethal gas. *LaGrand*, 119 S. Ct. at 1020. As a result, this Court determined that *Teague v. Lane*, 489 U.S. 288 (1989), operated to preclude the resurrection of a habeas claim that was expressly waived. *LaGrand*, 119 S. Ct. at 1020.

LaGrand also conceded at the district court level that his ineffective-assistance-of-counsel claim lacked merit. *Id.* at 1021. Therefore, he could not later assert it as cause for the default of another habeas claim. It was LaGrand's knowing and voluntary waiver of his claims which prompted this Court to grant Arizona's application to vacate the Ninth Circuit's order restraining Arizona from executing LaGrand by lethal gas. *Id.* at 1021 ("Walter

LaGrand entered a waiver of any potential claims of ineffective assistance of counsel and Burke [LaGrand's attorney] indicated to the Court that he believes that no such grounds exist. *LaGrand v. Lewis*, 883 F. Supp. 451, 456 n.3 (1995)"). *LaGrand* was decided on the basis of waiver, not because LaGrand's ineffectiveness claim was procedurally defaulted.

The partially quoted sentence that the Warden exclusively relies upon is actually an alternative and unexplained finding within the per curiam opinion and lacks the force of an adjudication. The unedited passage that the Warden cites reads in its entirety:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause, also fails. Walter LaGrand specifically waived the claim that his trial counsel was ineffective, representing to the District Court prior to filing his first federal habeas petition that there was no basis for such claims. *See LeGrand v. Lewis, supra*, at 456 n.3; *LaGrand v. Stewart, supra*, at 1269. In addition, the ineffective assistance of counsel claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to a state procedural rule, *see State v. LaGrand*, No. CR-07426, Minute Entry (Pima County Super. Ct. March 2, 1999), and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review."

LaGrand, 119 S. Ct. at 1021.

While *LaGrand* does not resolve the issue before this Court, the answer can be found woven throughout this

Court's habeas corpus jurisprudence. This Court has always treated habeas claims and reasons advanced as cause for the default of those claims differently. This difference in treatment is the basis of Carpenter's argument that the procedural default doctrine does not apply to his cause argument.

B. THIS COURT HAS ALWAYS TREATED "MERIT" CLAIMS AND "GATEWAY" CLAIMS DIFFERENTLY, AND IT SHOULD CONTINUE TO DO SO.

There are two types of claims advanced in federal habeas corpus proceedings. "Merit" claims are those claims upon which a federal court may grant relief. "Gateway" claims are those claims which are used to explain why otherwise procedurally barred constitutional claims should be considered on the merits. The Warden recognizes that cause arguments serve a "gate-keeping" function. Warden's Merit Brief, p. 18. The Warden fails, however, to distinguish between the distinct purposes of gateway and merit claims or between the relevant state interests they implicate.

The procedural default doctrine is not applicable to gateway claims for two reasons. First, a federal court may not grant relief from a state court judgment based purely upon a gateway claim; the favorable resolution of a gateway claim merely permits a federal court to consider an otherwise defaulted merit claim. Thus, a state's interest in finality is not compelling at the gate-keeping stage because the petitioner is merely seeking authorization from the court to apply for the writ. Second, the question

of procedural default is a purely federal inquiry. Federal courts decide which merit claims should be reviewed. And while a state's disposition of a case on procedural grounds is a relevant consideration with respect to merit claims, a state may not preemptively determine the scope of a federal court's discretion. Consequently, for purposes of gateway claims alone, exhaustion is enough.

1. In *Herrera v. Collins*, 506 U.S. 390 (1993), and *Schlup v. Delo*, 513 U.S. 298 (1995), this Court defined the difference between merit claims and gateway claims.

Two decisions from this Court explain that gateway claims and merit claims are functionally different. While not squarely presented with the issue posed here, *Herrera v. Collins*, 506 U.S. 390 (1993); and *Schlup v. Delo*, 513 U.S. 298 (1995), explain that merit claims and gateway claims serve distinct purposes.

In *Herrera*, the habeas petitioner alleged that he was actually innocent of the crime for which he was convicted and sentenced to death, but he did not allege a constitutional, trial error. Without an accompanying constitutional claim, a plurality of this Court held, his claim of actual innocence was irrelevant. "A claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to

have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.[5]

Herrera's claim of actual innocence was of no import because Herrera did not seek excusal of a procedural error so that he might bring an independent constitutional claim challenging his conviction or sentence. *Id.* The gateway claim of actual innocence would only be relevant if "the prisoner *supplements* his constitutional claim with a colorable showing of actual innocence." *Id.* at 404 (emphasis in original) citing *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986). In other words, had Herrera presented a separate merit claim – one amounting to a denial of a federal constitutional right – Herrera could have asserted actual innocence as his gateway claim to excuse the default of his merit claim.

It was of no consequence to this Court that Texas refused to entertain Herrera's newly discovered evidence of actual innocence. *Herrera*, 506 U.S. at 411. "A petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* at 404. Carpenter asserts that because the gateway claim could not, itself, disturb the finality of Herrera's conviction, this Court did not apply the procedural default doctrine.

Herrera failed because he could not articulate a federal, constitutional claim requiring exercise of the Great

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[5] While *Herrera* was a plurality opinion, all nine Justices of this Court agreed that Herrera's actual innocence claim could serve as a gateway to another constitutional claim.

Writ; he attempted to open a gateway to nowhere. But the petitioner in *Schlup v. Delo*, 513 U.S. 298 (1995), did it right.

Schlup filed a second federal habeas corpus petition asserting that he was actually innocent and that he was denied the effective assistance of trial counsel. Schlup's ineffectiveness claim was procedurally defaulted; nevertheless, this Court remanded his case for further proceedings to determine if he could demonstrate sufficient evidence of his actual innocence so that the procedural default of his ineffectiveness claim could be excused. *Schlup*, 513 U.S. at 332.

In doing so, this Court again noted the fundamental distinction between gateway claims and merit claims. Gateway claims, this Court held, are procedural rather than substantive. 513 U.S. at 314. Because no relief can be granted on claims that are purely procedural, a state has no interest in blocking a federal court's review of that claim; therefore, the federal courts were not restrained by the fact that much of Schlup's evidence of actual innocence was presented for the first time in a successor habeas petition. *Id.* Rather, this Court characterized Schlup's case as resting, in the final analysis, on his underlying merit claim, which could only be addressed if Schlup proved his gateway claim. *Id.* at 316.

While *Herrera* and *Schlup* both dealt with the fundamental-miscarriage-of-justice exception to procedural default, both cases teach that all claims advanced in federal habeas proceedings and, indeed, all arguments advanced in support of them, need not be constrained by the doctrines of exhaustion and procedural default. *See*

Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986) ("We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts"). Federal courts unquestionably owe a great degree of respect to state-court judgments, but not at the expense of an Article III Court's discretion to determine, in the first instance, if merit claims should be reviewed. *See Reed v. Ross*, 468 U.S. 1, 15 (1984) ("This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254"). Comity requires more than protecting the states' interests; those interests must be weighed against the federal courts' authority to remedy fundamental wrongs committed by the states.

2. The Exhaustion and Procedural Default Doctrines serve distinct purposes.

While federal courts must respect a state-court conviction, the state courts must also respect the federal judiciary's role in determining when claims are properly reviewable in habeas corpus proceedings. Accepting the Warden's position, federal courts will be precluded from considering meritorious constitutional claims once a state – rightly or wrongly – has foreclosed consideration of an argument upon which a petitioner does not seek federal relief. In short, the Warden is attempting to co-mingle the doctrines of exhaustion and procedural default when this Court has held that the doctrines accomplish different

goals. *See O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732 (1999).

The exhaustion doctrine serves two, simple goals. The exhaustion doctrine exists to give state courts the first opportunity to rule on the constitutionality of its own cases. *See Ex Parte Royall*, 117 U.S. 241 (1886); *Boerckel*, 119 S. Ct. at 1732. It also exists to encourage state courts to be the primary guarantor of prisoner's federal, constitutional rights. *Id.*

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. *Boerckel*, 119 S. Ct. at 1732. State prisoners, therefore, meet the exhaustion requirement by presenting their constitutional claims through one complete round of the State's established appellate review process. *Id.* Once a prisoner fulfills that obligation, the relevance of the underlying comity concern behind the exhaustion doctrine ends.

The problem of procedural default is separate from the question whether a state prisoner has exhausted state remedies. *Engle v. Isaac*, 456 U.S. 107, 125-126 n. 28 (1982). The procedural default doctrine is concerned with the finality of a state decision. If a prisoner does not comply with a state's procedural rules[6] so as to deprive the state of its ability to address a federal constitutional, merit

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[6] This assumes that a state's procedural rules are fair and adequate. If they are not, a state has no legitimate interest in the finality of its decision not to reach the merits of a federal, constitutional claim.

claim, then a federal court should not reach that claim and upset the state verdict.

States have a right to rely upon their own procedural framework for deciding cases. If a prisoner does not play by the state's rules, a state need not address federal constitutional claims on their merits, and the state has a strong interest in the finality of its decision. *See Francis v. Henderson*, 425 U.S. 536 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

A state's finality interest is only implicated with merit claims because resolution of a merit claim in a petitioner's favor disturbs a state's criminal verdict. Gateway claims do not disturb a state conviction because resolution of those claims in a petitioner's favor only permits a federal court to continue its review of a state conviction. That distinction is critical. If a state conviction cannot be upset based upon a gateway claim, then the state's finality interest is not compelling. If the State's finality interest is not compelling, the procedural default analysis is not relevant. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Conner, J. dissenting) (procedural default concerns "whether the federal court will *consider* the merits of the claim, that is, whether the court has the *authority* to upset a judgment" (emphasis in original)).

In Carpenter's case, his gateway claim of ineffective appellate counsel was subject to the exhaustion doctrine because it presented a claimed constitutional violation. Therefore, Ohio had an obligation to enforce federal constitutional law and should have done so. But because resolution of Carpenter's ineffectiveness claim only permitted the district court to evaluate his illegal-plea claim,

resolution of the ineffectiveness claim did not threaten the finality of Carpenter's conviction. Therefore, the procedural default doctrine is not applicable to Carpenter's ineffectiveness claim.

The Sixth Circuit correctly understood that Carpenter's gateway and merit claims served different purposes. The Sixth Circuit did not apply the procedural default doctrine to Carpenter's ineffectiveness claim because Ohio's finality interest was not compelling at that stage of the analysis. Only after Carpenter met the extraordinarily high burden of proof required by *Strickland v. Washington*, 466 U.S. 668 (1984), could the Sixth Circuit address Carpenter's underlying merit claim. In the end, the Sixth Circuit determined that Ohio had no legitimate interest in the finality of Carpenter's conviction because it was responsible for appellate counsel's ineffectiveness, and Ohio was responsible for illegally obtaining Carpenter's plea.

C. THIS COURT HAS NEVER APPLIED THE PROCEDURAL DEFAULT DOCTRINE TO GATEWAY CLAIMS.

Historically, this Court has only applied the procedural default doctrine to merit claims. It is the Warden, not Carpenter, who wishes to break away from twenty years of this Court's precedent by adding yet another layer of procedural default analysis to a process already fraught with complexity and confusion.

For over twenty years, it has been this Court's practice to apply the procedural default doctrine in the evaluation of merit claims alone. *See Coleman v. Thompson*, 501

U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); *Reed v. Ross*, 468 U.S. 1 (1984); *Engle v. Issac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S 536 (1976); and *McCleskey v. Zant*, 499 U.S. 467 (1991); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Connor J., dissenting) (noting that *Coleman*, *Murray*, *Reed*, *Engle*, *Sykes*, *Francis*, and *Zant*, all were only concerned with whether federal courts could consider the merits of a claim). Unable to present this Court with any authority that suggests the procedural default doctrine should be extended to cause arguments, the Warden attempts to accomplish his goal by relying upon the facts of *Murray v. Carrier*, 477 U.S. 478 (1986).

The Warden argues that *Carrier* stands for the proposition that a petitioner's gateway claim of ineffectiveness must not be procedurally defaulted in order for a federal court to consider it. Warden's Merit Brief, p. 23. The Warden supports his conclusion by arguing that Carrier's gateway claim was not procedurally defaulted; therefore, the Warden reasons, this Court properly considered it as cause for Carrier's defaulted merit claim. Warden's Merit Brief, p. 22. The Warden's analysis of *Carrier*, however, is incorrect.

There was no Sixth Amendment claim of ineffectiveness presented to this Court for review in *Carrier*.[7] In fact,

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[7] Even the Warden's *amici* do not agree with his assessment of *Carrier*. "Carrier had not raised an independent claim of assistance of counsel in state court. In fact the Court found that Carrier 'disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance of counsel claim.' " *Amici* Brief, p. 5.

this Court made a point of noting that Carrier abandoned his ineffectiveness claim in the Fourth Circuit and proceeded to this Court relying solely on the non-constitutional claim of "attorney inadvertence" as the cause for his defaulted merit claim. *Carrier*, 477 U.S. at 483.

Carrier's real gateway claim – an inadvertent mistake by counsel – was raised for the first time in the Fourth Circuit. *Id.* at 483. Even so, this Court considered whether that gateway claim was cause for the defaulted merit claim. Ultimately, Carrier's argument failed because his gateway claim did not amount to cause for the default of his merit claim. *Id.* at 489.

The Warden is accurate in one sense. *Carrier* held that when a constitutional violation is asserted as cause for a procedural default, the constitutional gateway claim should be exhausted. *Carrier*, 477 U.S. at 489. Through *Carrier*, this Court informed habeas petitioners that if they wish to assert ineffective assistance of counsel as cause, they have to: 1] present the ineffective assistance as an independent claim in state court; 2] assert an ineffective assistance claim that rises to the level of a Sixth Amendment violation; and 3] exhaust the ineffective-assistance-of-counsel-claim through the state courts. *Id.* at 488-489.

This Court's consideration of Carrier's non-constitutional gateway claim of attorney inadvertence despite the fact that it was procedurally defaulted, is telling. *Carrier* stands for the proposition that a gateway claim may be asserted as cause for the procedural default of another merit claim even if the gateway claim is procedurally defaulted. The very facts of *Carrier* demonstrate that.

Carpenter complied with *Carrier*. He presented his claim to Ohio through the appropriate procedural mechanism and, consistent with *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), he pursued it all the way to the Supreme Court of Ohio. The Warden conceded that Carpenter's ineffectiveness claim was exhausted, and the Sixth Circuit held that the claim was properly exhausted. J.A. 59.

Despite his concession in the district court, the Warden now paints Carpenter as depriving Ohio of an opportunity to address the merits of his ineffectiveness claim because Carpenter filed his Rule 26(B) application beyond the ninety-day period of an inconsistently applied rule. But as discussed in section II, *infra*, the Warden mischaracterizes the very rule upon which he relies. The Ohio appellate courts have full discretion to entertain an application for reopening filed beyond the ninety-day period if they determine "good cause" exists or that the claims themselves are meritorious. Rule 26(B) is not a bright-line test but a discretionary rule. If the State of Ohio wished to reopen Carpenter's direct appeal after reviewing his claims, it certainly could have. Indeed, Carpenter presented the claim to the Ohio courts at every available opportunity.

Principles of comity do not require placing a procedural default analysis on claims asserted as cause. The exhaustion requirement mandated by *Carrier* is sufficient because it ensures that a state court's available remedies are not ignored. The *Carrier* Court did not implement a procedural default requirement for claims asserted as cause, and one should not be engrafted now. Carpenter properly exhausted his ineffective-assistance-of-counsel

claim, and his underlying illegal-plea claim is meritorious.

Just last term, this Court implicitly rejected the Warden's "double procedural default analysis" argument in *Strickler v. Greene*, 119 S. Ct. 1936 (1999). In *Strickler*, the habeas petitioner discovered a valid *Brady v. Maryland*, 373 U.S. 83 (1963), claim while his case was pending in federal court. Strickler conceded that the claim was procedurally defaulted. The cause arguments advanced to excuse the default of the *Brady* claim were the same as the underlying facts of the *Brady* claim itself; therefore, Strickler's merit claim and his gateway claim were both procedurally defaulted.

Despite the "double default", this Court considered the facts of the *Brady* claim as cause for Strickler's merit claim. *Strickler*, 119 S. Ct. at 1949. Because two of the three components of the *Brady* test mirror the traditional cause and prejudice test, the *Strickler* Court determined that it could consider the *Brady* elements as cause for the procedural default. *Id.* There was no need to engage in a separate analysis of the procedural default, this Court held, because the *Brady* claim itself accommodated all of the interests the cause and prejudice test is designed to protect. *Id.* at 1949.

Strickler suggests that employing the cause and prejudice test twice with respect to a *Brady* claim (once to the defaulted merit claim and once to the gateway claim) to reach the merits of a procedurally defaulted claim is a redundant exercise. The same can be said when ineffectiveness is asserted as the cause for a procedurally defaulted merit claim. Even assuming that a state has

some compelling interest that is implicated at the gate-keeping stage, the extraordinarily high burden imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), accommodates all of a state's interests that are traditionally protected by the procedural default doctrine. This Court said as much in *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

In *Kimmelman*, this Court held that only by meeting the extraordinarily high burden of *Strickland* can a habeas petitioner secure relief even though the ineffectiveness is predicated on a defaulted Fourth Amendment claim. In doing so, this Court specifically rejected the argument that state interests could not be adequately protected if federal courts could consider defaulted Fourth Amendment claims in the context of attorney ineffectiveness. *Kimmelman*, 477 U.S. at 380-381.

Because *Strickland* is such a highly demanding test, this Court also rejected the notion, raised by the Warden's *Amici*, that applying *Strickland* to reach the merits of an otherwise defaulted Fourth Amendment claim would disturb a great many state-court judgments. *Amici* Brief, p. ii. To the contrary, the *Kimmelman* Court held that the mere assertion of ineffective assistance of counsel does not automatically cure the procedural default of a merit claim:

> Petitioners [the Warden] predict that every Fourth Amendment claim that fails or is defaulted in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise, and that, as a result, many state-court judgments will be disturbed. They seem to believe that a prisoner need only allege ineffective assistance, and if he has an underlying meritorious Fourth Amendment claim, the writ will issue and the State will be obligated to retry him without the challenged evidence. Because it ignores the rigorous standard which *Strickland* erected for ineffective assistance claims, petitioners' forecast is simply incorrect.

Kimmelman, 477 U.S. at 381. "A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a conviction is necessary to ensure a fair and just result." *Id.* at 393 (Rehnquist, J., concurring in judgment).

The same can be said here. It is only after Carpenter completely exhausted his ineffectiveness claim and satisfied *Strickland* that the Sixth Circuit reached his underlying merit claim. By satisfying and exhausting his ineffective-assistance-of-counsel claim, Carpenter did not subvert any state interests.

Carpenter's case demonstrates the inherent inequity in the Warden's argument. Carpenter was denied the effective assistance of counsel on appeal because his illegal-plea claim was not raised – conduct that must be attributed to the State of Ohio. *Kimmelman*, 477 U.S. at 379; *Carrier*, 477 U.S. at 488. The merits of that claim were not reviewed by the Ohio courts because they relied upon an inadequate and fundamentally unfair rule to bar consideration of Carpenter's ineffectiveness claim. J.A. 43. The Warden now wants to rely upon the purported default Ohio caused and Ohio's unfair refusal to remedy the problem as a means of restricting the federal courts from even entertaining the notion Carpenter's illegal-plea

claim might have merit. Carpenter has done nothing wrong. If equitable considerations truly guide the use of the Great Writ, then Carpenter should be permitted to divorce himself from the very state process that has caused his claims to go unnoticed for ten years.

D. WHETHER A PROCEDURAL DEFAULT MAY BE EXCUSED PRESENTS A QUESTION OF PURE FEDERAL, PROCEDURAL LAW.

Aside from the conceptual difference between merit claims and gateway claims, there is another, and perhaps simpler, reason why gateway claims need not be subjected to a procedural default analysis. Whether a cognizable procedural default has occurred is purely a question of federal procedural law. Unlike substantive, federal constitutional matters, state and federal courts do not have a concomitant obligation to apply federal procedural law. *See Boerckel*, 119 S. Ct. at 1732. Thus, the federal courts should not be constrained by state decisions when deciding the procedural question of whether to exercise their discretion and consider if a petitioner may apply for the writ of habeas corpus.

The Warden draws no distinction between merit claims and gateway claims and believes that the states determine the scope of federal review. But *Carrier* itself held that a state has no business deciding matters of federal procedural law:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of

> ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal court can adjudicate the question of cause – a question of federal law – without deciding an independent and unexhausted constitutional claim on the merits.

Carrier, 477 U.S. at 488-89 (citations omitted).

If a gateway claim asserts a denial of a federal constitutional right, it must be exhausted. *Carrier*, 477 U.S. at 489. But that is as far as the states' involvement should go especially when a claim of ineffective assistance is advanced to excuse a procedural default. To hold otherwise would strip federal courts of the ability to determine how and when they should entertain the merits of a habeas corpus petition.

Exhaustion is enough in this case because it is only concerned with whether Carpenter presented his claim of appellate ineffectiveness to Ohio. He did so. Ohio did not address Carpenter's ineffectiveness claim – not because the Ohio courts were unable to address the claim but because they chose not to.

Because the appellate-ineffectiveness claim is advanced here to explain the purported federal default of Carpenter's illegal-plea claim, Ohio's interest in the finality of Carpenter's conviction is not compelling. Carpenter does not seek relief based upon his gateway claim. He is only using it to explain what happened with respect to

his illegal-plea claim – a question of pure, federal procedural law and one that does not impact Ohio's interest in the finality of Carpenter's conviction. For those reasons, exhaustion is enough.

IV

EXTENDING *SYKES* WOULD COST MORE MONEY, DELAY THE RESOLUTION OF HABEAS CASES, AND MARK A RETREAT FROM THIS COURT'S PRECEDENT.

Accepting the Warden's invitation to extend *Sykes* to cause arguments will cost more money and further delay the resolution of habeas corpus cases, thereby impeding the efficiency of the federal courts. As a practical matter, extending *Sykes* will require another round of procedural default litigation before a federal court may exercise its discretion to review habeas claims.

The only opportunity for a state to raise the *Sykes* affirmative defense to the cause and prejudice arguments is after a prisoner offers a cause and prejudice argument in his traverse. Thus, states would be required to file a sur-reply or a separate pleading regarding the alleged procedural default. The petitioner would respond to that pleading and file additional pleadings for discovery, supplementation of the record or for evidentiary proceedings to contest the alleged procedural default. Only then could a federal court effectively consider whether there is a cognizable procedural default for a petitioner's asserted cause argument, and if so, whether the prisoner has offered adequate cause to excuse the procedural default as to his first layer of cause. Simply put, habeas costs

would rise by requiring the federal court's consideration of these additional federal issues.[8]

In *Withrow v. Williams*, 507 U.S. 680, 693-694 (1993), this Court addressed a similar cost issue when it decided that *Stone v. Powell*, 428 U.S. 465 (1976), did not prohibit the consideration of *Miranda* claims in federal habeas proceedings. This Court indicated:

> We likewise fail to see how purporting to eliminate *Miranda* issues from federal habeas would go very far to relieve such tensions as *Miranda* may now raise between the two judicial systems. Relegation of habeas petitioners to straight involuntariness claims *would not likely reduce the amount of litigation*, and each such claim would in any event present a legal question requiring an "independent federal determination" on habeas.

Withrow, 507 U.S. at 694 (emphasis added) (citation omitted).

If the Warden's argument is accepted, there will be additional burdens imposed upon a federal court as it answers the Warden's proposed federal questions. The federal court would be required to expend more time and resources to wade through the added filings and proceedings concerning those federal questions. As a practical matter, the court would be required to determine the federal question whether the alleged procedural default

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[8] Not mentioned by the Warden is the obvious point that if a petitioner has procedurally defaulted his gateway cause argument, then more than likely he has also procedurally defaulted his pre-gateway cause argument. The habeas remedy would become a perpetual abyss of procedural default.

of the gateway cause argument is a cognizable procedural default under *Sykes*.[9] If a warden satisfies *Sykes*, the federal court would be required to then determine the federal question whether a petitioner has cause and prejudice for the default of his gateway cause arguments, or can meet the manifest-miscarriage-of-justice exception.[10] By imposing a requirement that a court answer the added federal questions, there would be an increase in the litigation before the court and an increase in the burdens imposed upon a federal court.

The Warden's request would inject more doctrinal complexity into an already intricate system of threshold rules, which go only to the satellite question whether federal habeas courts can exercise the jurisdiction that Congress has given them by statute. The very point of *Carrier* was to make the job of habeas courts manageable by giving them a familiar (and demanding) standard to apply, i.e., *Strickland*. *Carrier*, 477 U.S. at 488-489 (*Strickland* test decreases costs to federal judiciary as opposed to inadvertence of counsel test).

The Warden invites this Court to blur the distinction between the exhaustion and procedural default doctrines. Last term, this Court reaffirmed its long-standing view

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[9] If answered negatively, the federal court would be required to return to the federal question concerning the gateway cause argument raised in response to a cognizable procedural default of the merits claim.

[10] If answered affirmatively, the federal court would be required to return to the federal question concerning the gateway cause argument raised in response to a cognizable procedural default of the merits claim.

that the exhaustion and procedural default doctrines involve distinct issues that serve different interests. *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1734 (1999); 119 S. Ct. at 1736-1737 (Stevens, J., Dissenting). *See also Sykes*, 433 U.S. at 78-79; *Engle v. Isaac*, 456 U.S. 107, 125-126 n. 28 (1982). The Warden now asks this Court to abandon these precedents and ignore the distinction between the two doctrines. He does so without offering a compelling reason to do so.

Accepting the Warden's invitation would further tax federal judicial resources. For those reasons, Carpenter urges this Court to decline the Warden's invitation to extend *Sykes* to cause arguments.

CONCLUSION

Robert W. Carpenter respectfully requests that the Warden's Writ of Certiorari be dismissed. In the alternative, Carpenter respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Ohio Public Defender

J. Joseph Bodine, Jr.*
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January 2000

APPENDIX

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APPENDIX

Rule 26 of the Ohio Rules of Appellate Procedure:

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the

appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the

filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The

parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

Former Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):

After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to *rule on an application for reconsideration* filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Current Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):

After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, *except* to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Franklin County Court of Common Pleas

[Caption Omitted In Printing]

Trial Transcript

* * *

[15] EXPLAIN TO THE COURT AND TO WHOEVER WHO IS WILLING TO LISTEN WHAT HAPPENED THAT NIGHT, AND THAT HE HIMSELF DID NOT KILL MRS. YOUNG, BUT THAT HE WOULD STILL AGREE TO ENTER A GUILTY PLEA IN ORDER TO AVOID THE IMPOSITION OR THE POSSIBILITY OF THE IMPOSITION OF THE DEATH PENALTY.

IS THAT YOUR UNDERSTANDING? DOES THAT ANSWER YOUR QUESTION, ROBERT

THE DEFENDANT: YES, SIR.

THE COURT: DOES THE STATE WISH TO COMMENT ONE WAY OR ANOTHER?

MR. HOGAN: NO, YOUR HONOR. IT WAS EXPLAINED TO US EARLY ON IN THESE PLEA NEGOTIATIONS THAT THE PLEA WOULD BE AN ALFRED PLEA.

THE COURT: OKAY. IN VIEW OF THE FACT, MR. CARPENTER, THAT YOUR COUNSEL HAS ADVISED THE PANEL THAT YOU'RE ENTERING THIS PLEA WITH THE UNDERSTANDING THAT YOU'RE DOING IT TO AVOID THE CONSEQUENCES OF GOING TO TRIAL, AND THAT YOU ARE NOT ADMITTING THAT YOU INTENTIONALLY CAUSED THE DEATH OF THELMA YOUNG, THELMA?

MR. SIMMONS: THAT'S CORRECT.

THE COURT: WHAT THE PANEL WILL HAVE TO DO I THINK IN THAT REGARD PROCEDURALLY IS THAT [16] WE'LL RESERVE ACCEPTING THIS PLEA OF GUILTY UNTIL WE HEAR A RENDITION OF THE FACTS BY THE STATE OF OHIO AND THEIR STATEMENT OF THE PANEL CONCERNING WHAT THEY BELIEVE THE FACTS IN THIS CASE WILL BE. AND THEN WE'LL LISTEN TO YOUR COUNSEL'S RESPONSE TO THOSE FACTS.

THE DEFENDANT: I HAVE A QUESTION ON THAT, SIR.

THE COURT: VERY WELL.

THE DEFENDANT: IF YOU PUT MY GUILTY PLEA TO THE SIDE AND THEN I GET UP AND GIVE MY STATEMENT ON WHAT REALLY HAPPENED THAT NIGHT, AND THEN YOU DECIDE TO WHERE YOU WANT TO DROP THE GUILTY PLEA AND TAKE ME TO COURT, THAT'S EXPOSING MY RIGHT AS A PROPER DEFENSE FOR MYSELF, IF I HAVE TO GO THAT ROUTE.

THE COURT: MR. CARPENTER, IN AN ALFRED PLEA, AS I UNDERSTAND IT, THE COURT IS OBLIGATED TO WITHHOLD ACCEPTANCE OF A PLEA UNTIL IT HEARS THE FACTS STATED BY THE STATE THAT TOUCHES ALL THE ESSENTIAL ELEMENTS OF THE CRIME ALLEGED IN THE INDICTMENT. AND DEPENDING UPON HOW THE DEFENSE RESPONDS TO THAT, WILL DEPEND UPON WHETHER THE COURT WILL ACCEPT THE GUILTY PLEA OR NOT.

IF, FOR EXAMPLE, THE STATE DIDN'T PRESENT [17] FACTS TO THE PANEL THAT TOUCHED ALL THE ESSENTIAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT, INCLUDING THE SPECIFICATIONS, THEN THE COURT WOULD BE OBLIGATED NOT TO ACCEPT THE PLEA.

NOW, I TAKE IT THAT UNDER THIS TYPE OF PROCEDURE THE STATE'S GOING, OR THE DEFENSE IS GOING TO STAND MOOT TO THE STATEMENT BY THE STATE AS TO WHAT THE FACTS ARE. YOU ARE NEITHER ADMITTING THEM NOR ARE YOU CHALLENGING THEM. AND IN THAT EVENT, THAT THE PANEL MOST LIKELY WILL ACCEPT THE STATE'S RENDITION OF THE FACTS IN THIS CASE.

THAT'S WHAT HAPPENS UNDER AN ALFRED PLEA. NOW, IF YOU WANT TO RECONSIDER THAT AT THIS TIME, YOU MAY DO SO.

MR. SIMMONS: IF I COULD ADD SOMETHING, YOUR HONOR.

THE COURT: THAT'S THE PROCEDURE THAT THE –

MR. SIMMONS: UNDER RULE 11, SPECIFICALLY RULE 11-C-3, IT READS INDICTMENT CONTAINS ONE OR MORE SPECIFICATIONS WHICH ARE NOT DISMISSED, UPON ACCEPTANCE OF THE PLEA OF GUILTY OR NO CONTEST TO THE CHARGE OR IF PLEAS OF GUILTY OR NO CONTEST TO BOTH OF THE CHARGES IN ONE OR

* * *

Ohio Court of Appeals
For the Tenth District

[Caption Omitted In Printing]

Carpenter's Application for Reopening

* * *

[1] Defendant-Appellant, Robert Carpenter ("Defendant"), respectfully makes application to this Court pursuant to App. R. 26(B) for an order granting him leave to reopen this appeal based on a claim of ineffective assistance of appellate counsel, and, in support thereof, states the following:

(a)

Reopening is sought in the Tenth District Court of Appeals Case No. 90AP-803, which was a direct appeal from the judgment of conviction and sentence entered by the Franklin County court of Common Pleas in Case No. 88CR-11-3707.

(b)

Defendant believes that good cause exists for the filing of this Application to reopen more than ninety days after the journalization of this Court's judgment in Case No. 90AP-803 because his appointed counsel in the direct appeal did not advise him of his right to seek court review of the issue raised by the assignment of error listed in part (c) of this Application, either during the pendency of the appeal, or during the ninety-day period after judgment, as; more fully appears in the attached supplemental affidavit; and in any event, App. R. 26(B)

and its ninety-day limitation were not in effect at the time the appeal was decided.

(c)

Defendant states that the following assignment of error was not considered by any appellate court because of appellate counsel's deficient representation:

Assignment of Error No. 2:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEAS FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

* * *

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[11] **AFFIDAVIT**

State of Ohio :
ss.,
County of Pickaway :

Robert Carpenter, being first duly sworn, deposes and says that the Office of the Franklin County Public Defender was appointed to represent me in a direct

appeal from the judgment of conviction and sentence entered by the court of common pleas in case no. 88CR-11-3707; that at the time the direct appeal was taken (and to this day) I was a laymen with no knowledge of, or education, or training in, criminal law and procedure; that the Assistant Public Defender assigned to handle my direct appeal under case no. 90AP-803 did not meet with me at any time to discuss the appeal, although it was my request that he do so; that I spoke with him by phone before the appeal brief was drafted and filed, and advised him that I desired to meet with him to review the brief prior to filing; that appointed counsel proceeded to file the brief without allowing me the opportunity to inspect and review it; that at the time my direct appeal was taken, I was not aware that I had a right to raise an assignment of error directed to the sufficiency of the evidence, and was not informed of this right; that had I been informed of this right, I would have requested my counsel to raise in my direct appeal an assignment of error directed to the issue of the sufficiency of evidence necessary to support my conviction for aggravated murder; that I recently learned through new counsel of my right to raise such assignment of error; that I believe the assignment of error has merit; that these circumstances prevented me from filing an application to reopen my appeal earlier; and that these circumstances are believed by me to constitute good cause for

* * *

Ohio Court of Appeals

[Caption Omitted In Printing]

Memorandum in Opposition, Pages 4-5

* * *

C. THE OHIO CONSTITUTION PRECLUDES CONSIDERATION OF AN "APPLICATION FOR REOPENING," WHEN THE APPLICATION WAS FILED AFTER THE TIME FOR APPEAL TO THE OHIO SUPREME COURT HAS PASSED.

The Ohio Constitution limits the jurisdiction of this Court. Section 3(B)(3), Article IV, of the Ohio Constitution states that "[j]udgments of the courts of appeals are final except as provided in section 2(B)(2) of this article." Section 2(B)(2) in turn defines the appellate jurisdiction of the Ohio Supreme Court to review judgments of the courts of appeals. The "final judgment" language of Section 3(B)(3) has prompted the Ohio Supreme court to state, as follows:

> . . . Section 3(B)(3) . . . provides that appellate judgments are final unless appealed as of right or by a request for this court's discretionary review pursuant to Section 2(B)(2), Article IV, Ohio Constitution. ***The effect of this deadline is clear – if no such appeal is filed, the judgment is binding and no longer subject to the court of appeals' jurisdiction to reconsider.***

State, ex rel. LTV Steel, v. Gwin (1992), 64 Ohio St. 3d 245, 249-50 (emphasis added). In *Gwin*, the respondent appellate judges could "provide no precedent that establishes a court of appeals' jurisdiction to reconsider a judgment

after the deadline I Section 3(B)(3), Article IV, Ohio Constitution." **Id.** at 250. The ***Gwin*** Court concluded that the appellate court judges "had no jurisdiction to reconsider the judgment . . . *sua sponte* more than five months after the judgment was entered." **Id.** at 250.

Given the language in **Gwin**, this Court does not retain jurisdiction to reconsider an appellate judgment that is over three years old. The State can imagine no reasonable interpretation of the "final judgment" language of Section 3(B)(3) that would allow this Court to reconsider its judgment over three years after that judgment.

For purposes of this case, it is not necessary to determine whether the "final judgment" language of Section 3(B)(3) invalidates the ninety-day time period set for applications for reopening in Appellate Rule 26(B). That rule does not apply to defendant, and defendant did not meet the ninety-day deadline. It would suffice to say that this Court's jurisdiction to reconsider expired at some point in the three years before defendant files his "application for reopening." Because of this lack of jurisdiction, this Court should deny defendant's application.

* * *

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT FACT SHEET FOR STATE HABEAS CORPUS APPEALS (2254)

Case Name and Number: ROBERT W. CARPENTER V. GARY C. MOHR, WARDEN, NO. 97-3392

Person Reporting: JON . WALDEN, AAG, Capital Crimes Section

1. Has this conviction(s) been previously litigated in the United States Courts?

   ( ) Yes (X) No

   If yes, give brief history: N/A

2. Constitutional violation claims (name constitutional provision and briefly recite facts asserted as violative):

   a. Fourteenth Amendment right to due process violated by conviction based on insufficient evidence.

   b. Sixth Amendment right to effective assistance of counsel violated by ineffective representation on first appeal as of right.

3. Have remedies been exhausted as to claims listed above?

   a. (X) Yes ( ) No

   b. (X) Yes ( ) No

4. Are there fact disputes concerning claims?

   ( ) Yes (X) No

   If "yes," were they resolved by the District Court

   ( ) at a hearing?

   ( ) by review of the state court record?

   ( ) by reference to a Magistrate?

5. Does the state argue that any constitutional violations, if found, were harmless beyond reasonable doubt?

   ( ) Yes (X) No

   If "yes," briefly state why and cite to the district court record entry pages claims as proof.

Ohio Rev. Code. Ann. § 2945.06:

2945.06 JURISDICTION OF JUDGE WHEN JURY TRIAL IS WAIVED; THREE-JUDGE COURT

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated

for his services as provided by section 141.07 of the Revised Code.

Ohio R. Crim. P. 11:

CRIM R 11 PLEAS, RIGHTS UPON PLEA

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in

divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a

reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying

agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.